

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 12-9006

HUBERT L. MICHAEL

v.

JOHN E. WETZEL, SECRETARY PENNSYLVANIA  
DEPARTMENT OF CORRECTIONS;  
LOUIS FOLINO, SUPERINTENDENT OF THE STATE  
CORRECTIONAL INSTITUTION AT GREENE;  
MARIROSA LAMAS, SUPERINTENDENT OF THE STATE  
CORRECTIONAL INSTITUTION AT ROCKVIEW

(M. D. Pa. No. 3:96-cv-01554)

ORDER

PRESENT: AMBRO, HARDIMAN,\* and NYGAARD, Circuit Judges

The District Court has granted a certificate of appealability (COA) in the above-captioned matter after denying Appellant Michael's Rule 60(b) motion to re-open his capital habeas case. The Commonwealth has filed a motion to vacate the COA. The Commonwealth argues, inter alia, that the District Court failed to specify the issues as required by 28 U.S.C. § 2253(c)(2). Third Circuit Local Rules require that the District Court rule on whether a COA should issue at the time the Court issues the opinion. L.A.R. 22.2 and 111.3; see also Fitzsimmons v. Yeager, 391 F.2d 849 (3d Cir. 1968). Although 28 U.S.C. § 2253(c)(2) requires that the judge granting the certificate specify the issues that meet the "substantial showing of the denial of a federal right" standard, this requirement is not jurisdictional. Gonzalez v. Thaler, 132 S.Ct. 641, 649 (2012). The District Court's COA is valid despite the failure to specify the issues. The Commonwealth's motion to vacate the COA will be denied.

---

\* The Honorable Morton I. Greenberg served on the panel that considered Appellant's prior appeal at Michael v. Horn, C.A. No. 04-9002. Judge Greenberg was unable, because of the hurricane that hit the East Coast, to consider the emergency motion for a stay of execution filed by Appellant in this matter, and the Honorable Thomas M. Hardiman has been substituted for Judge Greenberg for the proceedings on this motion only. Judge Greenberg will rejoin the panel after completion of briefing by the parties.

Once a certificate of appealability is granted, a court, "where necessary to prevent the case from becoming moot by the petitioner's execution, should grant a stay of execution pending disposition of an appeal. . . ." Barefoot v. Estelle, 463 U.S. 880, 893-4 (1983).<sup>1</sup> See also L.A.R. 111.3(b) ("If the district court grants the certificate of appealability... it must also grant a stay pending disposition of the appeal..."). Because the District Court has not granted a stay of execution, we hereby grant the Appellant's motion for stay of execution filed with this court.

While the failure to specify issues is not fatal to the appeal, the better course is to remand to the District Court for identification by the District Judge in the first instance of the issues that he determined satisfied the standard for granting a COA. See United States v. Eyer, 113 F.3d 470, 474 (3d Cir. 1997). Accordingly, the case is remanded to the District Court for such determination. The District Court is directed to designate, after briefing by the parties, within 14 days which issues meet the standard for a certificate of appealability. This Court retains jurisdiction during this limited remand.

Upon receiving the District Court's designation of any issues for the certificate of appealability, we will issue an expedited briefing schedule. In addition to the issues designated by the District Court, the parties should be prepared to address: (1) whether the District Court erred in denying the Rule 60(b) motion as a second or successive § 2254 petition; (2) whether the District Court abused its discretion in denying the Rule 60(b) motion for lack of extraordinary circumstances; (3) the merits of the claims in Appellant's § 2254 petition; and (4) whether the matter should be remanded to the District Court to decide the merits of the claims in Appellant's § 2254 petition.

By the Court,

/s/ Thomas L. Ambro  
Circuit Judge

Date: November 8, 2012

DMM/cc: Timothy P. Kane, Esq.  
Billy H. Nolas, Esq.  
David W. Wycoff, Esq.  
Christy H. Fawcett, Esq.  
Amy Zapp, Esq.



*Marcia M. Waldron*

Marcia M. Waldron, Clerk

<sup>1</sup> To warrant issuance of a certificate, petitioner must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2254(c)(2); Barefoot, 463 U.S. at 893. Petitioner must only show that "the issues are debatable among jurists of reason." Barefoot at 893 n.4; Miller-El v. Cockrell, 537 U.S. 322 (2003).